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In the Supreme Court of the United States

OCTOBER TERM, 1969

OCALA STAR-BANNER COMPANY,
a corporation, and LOYAL PHILLIPS,

Petitioners,

vs.

LEONARD DAMRON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

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March, 1970.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

Petitioners, Ocala Star-Banner Company, a corporation, and Loyal Phillips, pray that a Writ of Certiorari be issued to review the judgment of the District Court of Appeal, First District, State of Florida, entered in the above-entitled case.

OPINIONS BELOW

The opinion of the District Court of Appeal, First District, State of Florida, is reported at 221 So.2d. 459 (Appendix "A"). The opinion of the Florida Supreme Court refusing to review said decision (SC #8)[1] is not yet reported. It is attached as Appendix "C".

JURISDICTION

The judgment of the District Court of Appeal, First District, State of Florida (Appendix "A"), sought to be reviewed here, dated and entered on April 22, 1969 (DC #1) is reported at 221 So.2d. 459. The judgment was made final by an Order of the Supreme Court of Florida dated and entered February 20, 1970 (Appendix "D", SC #11) refusing to rehear its Order-Opinion of January 21, 1970 (Appendix "C", SC #8) dismissing the case for alleged lack of jurisdiction. The Florida Supreme Court had first, in July, 1969, *denied* motion to dismiss the appeal for want of jurisdiction (Appendix "B", SC #7) and set the case down for oral argument on the merits.

Under these circumstances, the Writ of Certiorari runs to the District Court of Appeal, First District, State of Florida. See *Missouri K. & T. R. Co. v. Elliott* (1902) 184 U.S. 530; *Sullivan v. Texas* (1908) 207 U.S. 416; *Cuyahoga R. P. Co. v. Northern Realty Co.* (1917) 244 U.S. 300; *Randall v. Board of Commissioners* (1923) 261 U.S. 252; *American Railway Express Co. v. Levee* (1923) 263 U.S. 19; *Adam v. Saenger* (1938) 303 U.S. 59; *Callender v. United States*(1965) 380

NOTE 1: We refer to Trial Clerk's certified record (Volume I) as "R"; to the Court Reporter's separate volumes of trial transcript (Volumes II and III) as "TT"; to the record volume in the District Court of Appeal (Volume VI) as "DC"; and to the volume covering the record in the Florida Supreme Court (Items 6-15) as "SC".

U.S. 519, 383 U.S. 270; *Beckley v. Hanks* (1967) 389 U.S. 81; and *Stern & Gressman*, Supreme Court Practice, page 113, Fourth Edition; page 88, Third Edition; and page 79, Second Edition.

It was necessary to first seek review by the Florida Supreme Court[2] before filing Petition for Certiorari in this Court. See *Banks v. California* (1969) 395 U.S. 708.

NOTE 2: Article V, Section 4(2), of the Florida Constitution provides:

"Appeals from District Courts of Appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially *construing a controlling provision of the Florida or Federal constitution.* The Supreme Court may review by certiorari any decision of a District Court of Appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the District Court of Appeal to be of great public interest, or that is in *direct conflict* with a decision of another District Court of Appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law."

Florida Statutes Section 59.45 provides:

"59.45. Misconception of remedy; supreme court. - If an appeal be improvidently taken where the remedy might have been more properly sought by certiorari, this alone shall not be a ground for dismissal; but the notice of appeal and the record thereon shall be regarded and acted on as a petition for certiorari duly presented to the Supreme Court."

By Petition for Rehearing (SC #9) and earlier brief and argument, it was pointed out to the Florida Supreme Court that in addition to the erroneous ruling by the District Court of Appeal on the Constitutional question, reviewable on appeal, the ruling here is further reviewable on "conflict" certiorari. It is squarely contrary to the decision of the Florida Fourth District Court of Appeal in *Urchisin v. Hauser* (1969) 221 So.2d. 752. In the *Urchisin* case, the Federal doctrine was correctly held to be applicable to "Non-governmental issues and non-governmental persons". The opinion here is also contrary to the decision in *Maloney v. Gibson and St. Joseph Telephone Company*, that plaintiff must prove express malice, handed down January 28, 1970, Case No. 39914, ____ So.2d. ____, and the Florida Chief Justice would have granted review on that ground. (SC #9)

Accordingly, in the Petition for Rehearing, it was again prayed that the Florida Supreme Court review either on appeal or by certiorari (SC #9).

As indicated, the Florida Supreme Court first ruled it had jurisdiction, and denied motion to dismiss the appeal (Appendix "B"). Many months later, it reversed itself (Appendix "C"). Then, despite Petition for Rehearing (setting up both the Constitutional appeal and

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257. The judgment of the Florida District Court of Appeal violates the rights of petitioners guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. Does a libel judgment against newspaper Petitioners in favor of Respondent Mayor and candidate for County Tax Assessor (primarily covering damages for loss of election) deprive Petitioners of their Constitutional rights where the record contains no evidence of (or even consideration given to necessity for) actual malice as defined by this Court?

2. Does the State Court's instruction to a jury (affirmed by the District Court of Appeal) that it must return a libel verdict against Petitioners in favor of Respondent Mayor and candidate for County Tax Assessor without any regard for actual malice, as defined by this Court, deprive Petitioners of their Constitutional rights?

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the discretionary "conflict" certiorari grounds for review), the Supreme Court of Florida denied the Petition for Rehearing (Appendix "D") and refused to take jurisdiction.

Accordingly, Petitioners here have exhausted their remedies for review in the Courts of Florida and their only recourse now is in the Supreme Court of the United States.

As stated in *Evans v. Abney*, ____ U.S. ____, 24 L.Ed.2d. 634,643 (January 26, 1970):

"No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated."

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment I:

"Congress shall make no law . . . . . abridging the freedom of speech or of the press . . . . . "

Amendment XIV:

". . . (N)or shall any State deprive any person of life, liberty,or property, without due process of law . . . . . "

STATEMENT OF THE CASE

Respondent (plaintiff) Leonard Damron, for many years Mayor of the Town of Crystal River, Florida, and, at the time of the alleged libel, candidate for County Tax Assessor of Citrus County, Florida, brought suit for libel (Appendix F) against newspaper Petitioners (defendants). The trial court, without giving any consideration to the question of express malice, *directed* a verdict for Respondent (plaintiff) and the jury brought in a verdict for $22,000.00. The judgment against Petitioners is in clear violation of the letter and spirit of *New York Times v. Sullivan* (1964) 376 U.S. 254, and succeeding cases. Not only is the record devoid of evidence of actual malice, but the court directed a verdict for Respondent on liability without regard to the question of actual malice.

Libel Complained Of

The complained-of story published in the Ocala Star-Banner, as alleged in paragraph 3 of Respondent's complaint (Appendix F), was:

"A case charging local garage owner *Leonard Damron with perjury*[3] was passed over for the present term of

---

NOTE 3: Emphasis here and elsewhere added by counsel unless otherwise indicated. Respondent emphasizes that he was not called a "public figure" or "public official". But in his complaint (Appendix F) he specifically alleged the public figure capacity and that he lost the election because of it. Meier, the area editor, infra, thought it was the public figure and that is the reason he used Leonard's name.

Federal court after Damron entered a guilty plea before Judge Harrold Carswell in Gainesville ..... ". (R. 1, 2 – See page A-12 infra for complete story).

Respondent Alleged Public Figure Damages

Respondent alleged in paragraphs 6, 9, 10 and 11 of his complaint (R. 2, 3 - Appendix F hereto) on which he went to trial, that he was a *public figure and sustained damages in that capacity* as follows:

"6. That the Plaintiff is and was on April 18, 1966, a public officer, being elected to the office of Mayor of Crystal River, Citrus County, Florida, and on said date was a candidate for the office of Tax Assessor for Citrus County, Florida, and was and is a businessman in said Town and County, owning and operating a garage. The plaintiff, Leonard Damron, is the only garage owner by the name of Leonard Damron doing business in the Marion, Citrus, Levy and Sumter County area."

* * * * *

"9. That the aforesaid article published on April 18, 1966, by the Defendants, set forth as Plaintiff's Exhibit "A", was published at a time and in a newspaper in general circulation in an area where voters who would cast their votes in a democratic primary on May 3, 1966, in which primary the Plaintiff was a candidate for the office of Tax Assessor of Citrus County, Florida, opposing two other candidates. That throughout the remainder of the political campaign, from April 18, 1966, the Plaintiff was repeatedly required to answer questions regarding the charges against him of perjury purportedly pending, and that although the Plaintiff fervently denied such charges and endeavored to make

it known that the statements printed in said article were false, he has been unable to remove the damage to his reputation caused by said article."

"10. That the Plaintiff continues to hold the office of Mayor of the Town of Crystal River, Citrus County, Florida, having been duly elected to said office prior to the publication of the said article attached hereto as Plaintiff's Exhibit "A", and Plaintiff desires to continue to hold this office for which he will be required to campaign and run for re-election in December of 1966, and overcome the false and defamatory statements in said article that Defendants have caused to be published, which continues to create doubt and suspicion in the mind of the people of Citrus County, Florida, as to the integrity of the Plaintiff."

"11. Because of the actions of the Defendants in the publication of the aforesaid article as attached hereto as Plaintiff's Exhibit "A", the plaintiff has suffered irreparable damages to his reputation, as an individual, public officer, candidate for public office and as a businessman." * * * * *

Thus, Respondent expressly alleged his case to come within the purview of the Federal Constitutional Law of Libel, a factor not considered in the District Court opinion. Respondent made his own bed and must lie in it. His own complaint shows the public interest.

Petitioners moved to *dismiss* the complaint since it failed to allege that the publication of the article was made "maliciously" and also failed to allege "wantonness, recklessness or carelessness". (R. 7).

Petitioners further moved to *strike* the first two clauses of

the first sentence of paragraph 6, and also paragraphs 9 and 10, all quoted above, and claiming *"public figure"* damages. (R. 8)

Petitioners further moved to strike the portion of paragraph 11 "alleging damages to plaintiff's reputation either as a *public officer or as a candidate for public office.*" (R. 8)

All of Petitioners' above motions were denied. (R. 9)

Answer was filed denying the material allegations (R. 10, 12) and the case went to trial. At the trial, the jury was given no instructions on "express malice". Instead, it was instructed that since the publication charged the crime of perjury, this was libel per se, malice was imputed or presumed, no proof of malice was required, and the only question was the amount of damages (TT. 301, 303, 305, 306, 307), including damage to Respondent as a "public official". (TT. 304) Attached as Appendix "E" are pertinent portions of the Court's instructions to the jury. As stated in the District Court opinion (Appendix A) "a *directed verdict* on the question of liability was granted."

The jury failed to find punitive damages. It did bring in a verdict for $22,000.00 compensatory damages. (R. 18, 19)

Motion for new trial was filed emphasizing that the evidence was insufficient to satisfy the Constitutional rule. (R. 20, 21)

The Court denied the motion (R. 22, 23), the District Court of Appeal affirmed, and the Florida Supreme Court, after briefs and oral argument, dismissed appeal for alleged want of jurisdiction (Appendix C) after it had *first* held it did have jurisdiction and had denied motion to dismiss appeal for want of jurisdiction. (Appendix B)

The District Court opinion (Appendix A) erroneously construed the First Amendment as not requiring proof *or* allegation of "express malice" in the case of public figure Damron so suing for public figure damages. It erroneously construed the First Amendment as follows:

> ". . . . . Our impression is that it is the public officer's *official conduct* or the manner in which he performs his duties that affords the media a wide latitude for comment. It is the plaintiff officer's *performance of duty* that is so affected by the public interest which justifies the protection from libel actions afforded by the *New York Times* doctrine in the absence of proof of malice. . . . . The plaintiff's official conduct or the manner in which he performed his duties were not the basis for the inaccuracy here involved; and hence, it does not come within the protection afforded by the rule announced in the *New York Times* case. It follows, therefore, that the trial judge correctly held that it was unnecessary for the plaintiff to show malice." (Appendix A)

It is this dangerous, utterly erroneous, and completely misleading language that will cause the Federal Constitutional Law of Libel to be almost meaningless in Florida (and particularly in the First District) until this opinion is reversed and comes out of the case books.

This decision is even more dangerous and misleading than those in *Roy v. Monitor - Patriot* (N.H. 1969) 254 A.2d 832, certiorari granted February 24, 1970, Case #891; and *Greenbelt* v. *Bresler* (Md. 1969) 254 A.2d 755, certiorari granted and the case now awaiting decision by this Court after oral argument, Case #413.

Evidence at the Trial

There was no dispute but that the Petitioners erroneously published that Respondent had been indicted for perjury rather than his brother, James Damron (who was running Respondent's business while Respondent campaigned - TT. 33)

On April 18, 1966, Petitioners' Area Reporter Ware telephoned in a story with respect to a Damron being charged with perjury in Federal Court in a civil rights case, a matter of public interest (TT. 163)(R. 6). The story was telephoned in to Petitioners' Area Editor Meier who had only been in the Ocala area for a few days over a month (TT. 153), and who did not know Damron except by his reputation as a public figure (TT. 171). Damron was so much in the public eye that numerous stories had been in the paper about him, handled by Meier (TT. 164). Although the reporter says she telephoned in the correct name, Meier thought they were talking about Respondent, the public figure, about whom he had published so many prior stories. Accordingly, he automatically wrote down and used in the story the name of Leonard Damron rather than the name of Respondent's brother, James Damron (TT. 163).

It being conceded that Petitioners had published the story and made the error (albeit an innocent one, free of malice), Respondent based his case almost entirely on his *public figure* damage.

At TT. 9, Respondent testified:

> "I have been Mayor for four terms ---- well, I kept a scrap book (Ocala Star-Banner articles) and to where I could always refer back to my activities as Mayor and all the other civic organizations I belong to."

At TT. 12, he said:

> "I felt like it (the publication) had ruined me – I was running for Tax Assessor at that time and I had already covered probably two-thirds of the county from door to door, with political speeches, and running ads in the newspapers and I was so upset – I called you (plaintiff's attorney) and asked for your advice – and wrote the Ocala Star-Banner a letter - "

At TT. 13, Respondent read to the jury *his* published letter to the Ocala Star-Banner,[4] from which we quote:

> "You are advised that the undersigned Leonard Damron has never been charged with the crime of perjury, is presently Mayor of the Town of Crystal River, and is presently a candidate for Tax Assessor of Citrus County, Florida."

At TT. 192, Respondent's counsel had another witness again read to the jury his exact above letter as to his public figure status.

We further quote from the trial transcript:

> "Q. Immediately after the publication of this article, what was the reaction of people to you from whom you would *solicit votes*?
>
> A. Very cold." (TT. 24)

* * * * *

NOTE 4: Petitioners not only published Respondent's letter (TT. 192) but upon the error being discovered, they had previously on their own volition run a correction and retraction the day after the error appeared (TT. 155-6). As stated by Petitioner Publisher: "We ran three corrections on two different days." (TT. 194). In interrogating the Publisher before the jury, Respondent's counsel once again emphasized that Petitioners *knew* that, and Respondent *was*, "a public office holder" and "*was also* a candidate for Tax Assessor of Citrus County, Florida" (TT. 193).

"Q. Were you able to overcome the effect of this publication on your candidacy as Tax Assessor?

A. No, sir.

Q. What was the result of the election?

A. I got beat." (TT. 24, 25)

* * * * *

"Q. Now, then, Mr. Damron, as to the office of Tax Assessor for which you were running, do you know what the annual compensation is in that office?

A. $9,000.00 a year." (TT. 28)

"Q. After this publication of the article, did you run again for the office of Mayor of Crystal River?

A. Yes, sir." (TT. 26)

* * * * *

"Q. What, if any, voter opposition did you meet in campaigning for this office in the year 1966 that you did not meet in prior years?

A. The vote was ..... the public was a little cooler ..... they wasn't as friendly ....." (TT. 27)

Respondent testified he was *defeated for Mayor* by 28 votes the last time (TT. 50, 26)

Respondent's twelve witnesses repeatedly testified on the alleged bad effect Petitioners' publication had on the voting public and Respondent's chances for election. (TT. 66, 68, 94, 105, 109, 117, 123, 129, 140). Not one of them testified to

(a) any express malice, or (b) any monetary damage other than *loss of public office and campaign contributions.* (TT. 68).

As indicated, Respondent's complaint did not allege that Petitioners published the statement about Respondent with actual malice as defined by this Court. For this reason, Petitioners moved to dismiss the complaint and to strike allegations as to public figure damages therefrom, prior to trial. The trial record does not contain a scintilla of evidence that Petitioner's story was written with actual malice as defined by the Court. Far from proof of "convincing clarity", there was no evidence at all of express malice. Nonetheless, the Court directed a verdict for the Respondent on the erroneous assumption that a charge of perjury "was libelous per se" (TT. 303), there "must be a finding in favor of plaintiff" (TT. 301), and that Respondent was entitled to compensation for "injury to his reputation as a citizen and public official". (TT. 304)

REASONS FOR GRANTING WRIT

The opinion of the District Court of Appeal (Appendix A) is a flat repudiation of the rulings of this Court.

The ruling of the Florida Court applies the Federal Constitutional Law of Libel *not* to public figures, candidates, and matters of public interest, as held by this Court. Instead, it limits the doctrine to Respondent's "*official* conduct or the manner in which he performed his *duties*".

Even Respondent's own counsel finally recognized that this was erroneous, and we quote from page 17 of Respondent's brief before the Supreme Court of Florida:

"This decision [Time v. Hill (1967) 385 U.S. 374]

> clearly shows that the United States Supreme Court is granting a privilege under the First Amendment to the United States Constitution when the article is directed to official conduct, official duties, public issues, matters of public interest, and public affairs."

The trial court directed a verdict on the ground that the *New York Times* doctrine had no application here since the story did not *specifically* refer to Respondent as a *public official* or to his *official conduct.* (Appendix E) The Florida Court utterly ignored in this case that the Constitutional protection goes much beyond official conduct and performance of official duties, and extends to matters of public interest. Especially is this true when Respondent's entire case is bottomed on the damage that he sustained when he was defeated for election as County Tax Assessor and was later defeated for re-election as Mayor.

Newly-arrived Area Editor Meier thought it was the public figure involved in the indictment for perjury, and he wrote the story about the public figure. Respondent said that the public applied the story to Respondent in his public figure capacity and that is the reason he lost the votes in the election.

It was stated by counsel for both sides in oral argument before the Supreme Court of Florida that they understood the $22,000.00 verdict was made up of two years' salary as County Tax Assessor at $9,000.00 per year, plus $4,000.00.

Petitioners were deprived of their Constitutional rights because the Florida Courts limited the Constitutional rule to *official conduct* of a *public official.*

Respondent cannot have his cake and eat it, too. He cannot recover public figure damages without being subject to the *New York Times* rule of public figure damages. The rule applies to matters of public interest.

Respondent's Argument

Respondent argues that the story did not in so many words refer to Respondent as "Mayor" or as "candidate for County Tax Assessor, or as "a public figure". The District Court opinion (Appendix A) emphasized this.

It is apparently Respondent's theory that a story charging "President Richard Nixon" with perjury comes under the Federal rule. But the same story charging only "Richard Nixon" does not, even though "public figure" damages are specifically sought.

Suppose Respondent had been referred to as "Mayor". Could he still recover damages as a candidate for County Tax Assessor without complying with the Federal rule?

To state the proposition is to demonstrate its absurdity. Mr. Nixon and Respondent are each "a public figure", in his own sphere, regardless of how he is designated.

If they seek "public figure damages", they come under the "public figure rule".

The Federal doctrine did originally apply to "official conduct of public officials". The District Court of Appeal simply did not realize that it has successively been *extended* to "candidates", to mere "public figures", and to "matters of public interest".

Obviously, there could be no "official" conduct of a public figure. Walker was not engaged in official conduct in the *Associated Press* case. As stated at 388 U.S. 154, Walker "commanded a substantial amount of public interest at the time of the publication", just as did the Mayor of Crystal River, Florida, and candidate for County Tax Assessor, in his area. It was because of Damron's public figure activities

and the interest the public had in him that Meier (who did not know Respondent) thought it was Respondent who was involved and therefore wrote the story about Respondent. Had Respondent not been a public figure his name would not have been known to Meier and would never have been used.

Wally Butts was a football coach employed by a corporation, and Edwin Walker was a private citizen. Butts was accused of fixing football games --- Walker of leading a riot. See *Curtis Publishing Company v. Butts*, infra.

What "official conduct of a public official", as the doctrine is limited by the Florida District Court of Appeal, was involved in either case?

It is not necessary to designate "Richard Nixon" in so many words as a "public figure" or "President" or as "a man in the public eye" to make him a public figure. The test is whether he actually is a public figure or whether we have a matter of public interest. The same thing applies to Respondent.

But here, Respondent *removed any doubt*. He not only specifically alleged he was "Mayor" and "candidate for County Tax Assessor" in his complaint, but claimed he was "harmed with the electorate" and actually lost both offices because of the article. How could there be any clearer application of the *Curtis Publishing* and *Garrison* cases, infra, which prevent public figures from collecting damages (either to their public or personal reputations) without proving "calculated falsehood"? But the words "public figure" or "matter of public interest" do not appear once in the District Court opinion. So far as the District Court was concerned, *Time, Curtis Publishing, Garrison,* and *Associated Press* were never enunciated by the United States Supreme Court.

The public and private reputation damages are inextricably mixed in the verdict, and *Garrison,* infra, holds that private reputation damages come under the Federal rule once public reputation is damaged.

We repeat, Respondent cannot have his cake and eat it, too. When Respondent decided to claim the public and the electorate applied the news story to him as Mayor and candidate for County Tax Assessor, he himself invoked the Federal rule. He asserted he was a public figure and had been damaged as a public figure.

The District Court opinion shuts its eyes to this paramount and overriding factor which Respondent himself elected to inject into the case, and on which he sought and recovered public figure damages, i. e., the application by the voting public of the alleged libel to plaintiff in his public figure capacity and his consequent loss of his political races. It was a matter of public interest.

The District Court opinion is erroneous, dangerous and misleading.

In the *New York Times* case, in *Butts,* in *Walker,* and in *Hill,* all cited infra, as well as in the case presently before the Court, the function served by the First Amendment was to provide the public with information on matters in which it had a legitimate and substantial interest. If the plaintiff in a particular case occupies a position of some "public" status, the public may have a legitimate and substantial interest in statements about him solely for that reason. But this would merely be an incidental aspect of the broader base of the First Amendment protection, the right to inform the public on matters of legitimate public interest, not the basis for a mechanically restrictive rule.

The story here was on a matter of public interest because of the indictment in a civil rights case for perjury. Even if it had not related to a public figure, the newspaper had a right to run a story on a matter of public interest, i.e., federal indictment of a business man for *civil rights perjury.*

Federal Constitutional Law of Libel

There is no need to repeat in detail to this Court what it has said so many times. Plaintiff in any libel action to which the Constitutional rule applies (and this includes stories about public officers, candidates for public office, public figures, and matters of public interest) must prove "actual malice" with "convincing clarity". "Actual malice" means "actual knowledge of falsity" or "recklessness". *New York Times v. Sullivan* (1964) 376 U.S. 254.

"Recklessness" means "a high degree of awareness of probable falsity". *Garrison v. Louisiana* (1964) 379 U.S. 364.

"Intent to harm" does not suffice. There must be "intent to harm through falsehood". *Henry v. Collins* (1965) 380 U.S. 356.

"Failure to investigate" does not impair the privilege. *Beckley v. Hanks* (1967) 389 U.S. 81; *New York Times,* 376 U.S. 287-288; *Time,* 385 U.S. 374, 388-389; *Curtis Publishing,* 388 U.S. 153-154.

"Recklessness" also means "serious doubts as to truth". *St. Amant v. Thompson* (1968) 390 U.S. 727.

And in the case of a public figure, the doctrine covers *private reputation* as well as *public reputation.* "To this end, anything which might touch on an official's *fitness for office* is relevant. Few personal attributes are more germane to fit-

ness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Garrison*, supra, 379 U.S. at page 77.

The Constitutional test has thus been established by the Supreme Court beyond peradventure of doubt.

Public interest had been the basis for the holdings in *New York Times* (page 269) and *Garrison* (pages 74-5), even though the actual holding in those cases was limited to public officials. It was also the basis for the holding in *Rosenblatt v. Baer* (1966) 383 U.S. 75, 84-6. It was the direct holding in *Time v. Hill* (1967) 385 U.S. 374. It was likewise the basis for the holding in *Curtis Publishing Company v. Butts* (1967) 388 U.S. 130, 150-2, which case extended the doctrine to *public figures*.

Recognizing that the public interest in the statements at issue was the basis for the grant of constitutional protection in the *New York Times* case, in *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), in *Butts*, 388 U.S. at 150-152, and in *Walker*, 388 U.S. at 155, and the clear holding of this Court in *Time, Inc. v. Hill*, 385 U.S. 374, 387-388, both the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Fifth Circuit have explicitly recognized the inevitable applicability of the public interest test in a defamation context. In each case, this Court denied certiorari. See *Time, Inc. v. McLaney*, 406 F.2d. 565 (5th Cir. 1969), cert. denied, 395 U.S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting System*, 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969). Other courts have also recognized that the "public official and "public figure" cases in this Court were but specific applications of the broader constitutional principles upon which those decisions are

founded, and consequently have not viewed the status of the plaintiff as critical but have accepted and applied the public interest or issue basis for application of the First Amendment privilege. See *Bon Air Hotel, Inc. v. Time, Inc.*, 295 F.Supp. 704 (S.D.Ga.1969); *All Diet Foods Distributors, Inc. v. Time, Inc.* 290 N.Y.S.2d. 445 (N.Y.Sup.Ct.1967); *Fotochrome, Inc. v. New York Herald Tribune, Inc.* (Sup. Ct. of N.Y. 1969) 61 Misc. 2d. 226; *Farnsworth v. Tribune Company* (Sup.Ct. of Ill. 1969) 253 N.E.2d. 408; and *Wasserman v. Time* (C.A.D.C. March 3, 1970) ..... F.2d. ..... These cases all conform to the principles and analysis announced by this Court.

The newspaper under the First Amendment had the right to report stories of public interest, which would include the indictment for perjury in a civil rights case. But if there had been any doubt as to the First Amendment applicability, Respondent removed all doubt by his pleadings and proof of public interest and public figure damages.

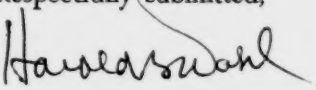
Here we had a small rural county with not even a newspaper of its own. The time was April, 1966, *at the height of the civil rights controversy* and in the midst of an election campaign. News Editor Meier erroneously (but without malice) understood that it was the Mayor and candidate for County Tax Assessor who had been indicted for perjury in a civil rights case, and wrote the story about him. Then, to remove any doubt, Respondent plaintiff filed his suit, alleged that he was Mayor and candidate for County Tax Assessor, that the public applied the story to him in that public figure capacity, and that he was damaged "as a public official, candidate for public office ....." Notwithstanding Respondent predicated his case on the public figure angle, and his testimony was almost exclusively on that alleged damage, the Court did not even let the jury consider the question of

malice. Instead it told the jury that the only question was how much money Respondent was entitled to, and that his damages expressly included damage to him as a "public official."

CONCLUSION

For the reasons set forth hereinabove, this Petition for a Writ of Certiorari should be granted. Petitioners respectfully urge this Court to reverse summarily the judgment of the District Court of Appeal, First District, State of Florida, concurrently with its issuing the Writ of Certiorari.[5]

Respectfully submitted,



HAROLD B. WAHL,
Loftin and Wahl,
414 Florida Title Building,
Jacksonville, Florida, 32202,

Attorneys for Petitioners.

NOTE 5: As the Court did in *Beckley* v. *Hanks*, (1967) 389 U.S. 81.

APPENDIX A

OPINION — 221 So.2d 459

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1969.

CASE NO. K-86

OCALA STAR-BANNER COMPANY,
a Florida corporation, and
LOYAL PHILLIPS, individually,

Appellants,

v.

LEONARD DAMRON,

Appellee.

Opinion Filed April 22, 1969.

An Appeal from the Circuit Court for Marion County.
D. R. Smith, Judge.

Loftin & Wahl and Greene, Ayres, Swigert & Cluster, for Appellants.

Wallace Dunn, for Appellee.

PER CURIAM

Appellant has appealed a final judgment entered pursuant to a jury verdict awarding damages to the appellee in a libel action.

The libel consisted of an item published in appellant's newspaper stating that appellee had been indicted for perjury by the federal government. As it turned out, the publication was false in that it was appellee's brother who had been so indicted and not the appellee himself. A directed verdict on the question of liability was granted, and the case went to the jury on damages only.

Appellant contends that this case is controlled by the recent pronouncements of the federal courts on the law of libel as it relates to the news media typified by New York Times v. Sullivan, 376 U. S. 24, 84 S. Ct. 710, 11 L. Ed. 2d 686, which in essence held that before a plaintiff may recover for libel from a newspaper, express malice must be shown. This principle seems to rest on the proposition that a newspaper has a duty to comment upon the manner in which our public officials perform the duties of their office and that in so commenting, the media is entitled to a greater latitude in bringing out matters concerning such officials which when spoken or written about a nonpublic official or figure might be libelous per se. We have no particular quarrel with that concept when its application is limited to cases giving rise to its emergence.

In the New York Times case, the court stated at 11 L.Ed. 2d 706:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood *relating to his official conduct* unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (Court supplied emphasis)

The court further stated at page 708:

> "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials *against critics of their official conduct.*" (Court supplied emphasis).

And again in footnote 23 at page 708:

> ". . . that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. . . . they must be read as *describing his performance of his official duties.*" (Court supplied emphasis)

We have underlined certain phrases in the foregoing excerpts from New York Times to demonstrate the basis of our impression that it is the public officer's official conduct or the manner in which he performs his duties that affords the media a wide latitude for comment. It is the plaintiff officer's performance of duty that is so affected by the public interest which justifies the protection from libel actions afforded by the New York Times doctrine in absence of proof of malice. Indeed, the article itself makes no reference at all to the plaintiff's position as an officer or candidate for office. Hence, the record is devoid of any evidence to show that the appellant was acting in the area falling within the federal rule asserted.

An examination of the defamatory publication which gave rise to this case reveals that the plaintiff's official conduct or the manner in which he performed his duties were not the basis for the inaccuracy here involved; and, hence, it does not come within the protection afforded by the rule announced in the New York Times case. It follows therefore

that the trial judge correctly held that it was unnecessary for the plaintiff to show malice.

We have considered the other matters raised by appellant and find them to be without substantial merit.

AFFIRMED.

RAWLS, Acting Chief Judge; JOHNSON and SPECTOR, JJ., CONCUR.

APPENDIX B

ORDER DENYING MOTION TO DISMISS APPEAL

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1969
MONDAY, JULY 7, 1969

CASE NO. 38,658

OCALA STAR-BANNER COMPANY,
etc., et al.,

Appellants,

vs.

LEONARD DAMRON,

Appellee.

Appellee's motion to dismiss appeal is hereby denied.

ERVIN, C. J., ROBERTS, THORNAL and CARLTON, JJ., concur.

DREW, J., dissents.

APPENDIX C

ORDER DISMISSING APPEAL

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. A. 1970

CASE NO. 38,658

OCALA STAR-BANNER COMPANY,
a Florida corporation, and
LOYAL PHILLIPS, individually,
Appellants,

vs.

LEONARD DAMRON,
Appellee.

Opinion filed January 21, 1970.

An Appeal from the District Court of Appeal, First District.

Harold B. Wahl of Loftin and Wahl, for Appellants.

Wallace Dunn, for Appellee.

PER CURIAM.

Review having been sought by direct appeal from the District Court of Appeal, First District, and argument having been heard and the record having been examined, it is our opinion and we hold that the cause sub judice is not within the orbit of the jurisdiction of this court as set forth by Section 4(2), Article V, Constitution of Florida. Therefore the cause is dismissed ex mero motu.

It is so ordered.

ERVIN, C.J., Roberts, Drew, Adkins and Boyd, JJ., concus.

APPENDIX D

ORDER DENYING REHEARING

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1970
FRIDAY, FEBRUARY 20, A.D. 1970

CASE NO. 38,658

OCALA STAR-BANNER COMPANY,
a corporation, et al,

Appellants

-vs-

LEONARD DAMRON,

Appellee.

On consideration of the Petition for Rehearing filed by Attorneys for Appellants,

IT IS ORDERED BY THE COURT that said petition be, and the same is hereby, denied.

A TRUE COPY

(COURT SEAL)

TEST:

/s/ SID J. WHITE
CLERK SUPREME COURT

APPENDIX E

Excerpts from Trial Court's Instructions to Jury Contrary to New York Times Rule.

"The Court instructs the Jury that you need not consider whether a libel has been committed and instructs you that there *must be a finding in favor of the Plaintiff* in accordance with the other instructions given you by the Court." (TT. 301).

"You are instructed that in this case the charge made against the Plaintiff was libelous, per se, and that it created a *presumption of damage* to the Plaintiff * * *." (TT. 303).

"The Court instructs the Jury that in your consideration of damages that may be awarded to the Plaintiff, you may do so in accordance with the following: First, as to compensatory or actual damages, you may award a sum that will fully and adequately compensate the Plaintiff for his mental suffering, embarrassment and injury to his reputation as a citizen and *public official*, and any other damages that would naturally flow from being falsely accused of a felony." (TT. 304).

"In other words, if you are reasonably satisfied from the evidence that the defendants imputed the charge of perjury to the plaintiff, of which he was not guilty, *then you may infer that it was maliciously made* and it is not necessary to prove any express malice or ill-will in order to warrant a verdict for punitive damages in favor of the plaintiff." (TT. 305).

(As stated in Appendix A by the District Court of Appeal:

> "A *directed verdict* on the question of liability was granted, and the case went to the jury on damages only.")

APPENDIX F

COMPLAINT IN TRIAL COURT

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY.

AT LAW NO. 14659

LEONARD DAMRON,

Plaintiff,

vs.

OCALA STAR-BANNER COMPANY, a Florida corporation, and LOYAL PHILLIPS, individually,

Defendants.

COMPLAINT

The Plaintiff, Leonard Damron, by his undersigned attorney, brings this complaint against the Defendants, Ocala Star-Banner Company, a Florida corporation, and Loyal Phillips, individually, and alleges:

1. The Plaintiff is a resident of Crystal River, Citrus County, Florida.

2. The Defendant, Ocala Star-Banner Company, a Florida corporation, has its principal place of business in Marion County, Florida, and is the owner and distributor of the Ocala Star-Banner, a newspaper which is generally distributed in Marion, Citrus, Levy and Sumter Counties, and elsewhere. The Defendant, Loyal Phillips, is a resident of Ma-

rion County, Florida, and is a Vice President of the Ocala Star-Banner Company, and Publisher of the Ocala Star-Banner.

3. That the Defendants caused to be published in the April 18, 1966 issue of the Ocala Star-Banner a defamatory article which appeared on page 9 thereof entitled: DAMRON'S CASE PASSED OVER TO NEXT U. S. COURT TERM, and said article began with the statement:

> "A case charging local garage owner Leonard Damron with perjury was passed over for the present term of Federal Court after Damron entered a not guilty plea before Federal Judge Harrold Carswell in Gainesville. * * *"

A copy of said article in total is attached hereto and made a part hereof as Plaintiff's Exhibit "A".

4. That on April 19, 1966, the Plaintiff did cause to be served, by mail at least five days before the institution of this action, upon the Defendant, Loyal Phillips, Publisher, who is a Vice President of the Ocala Star-Banner Company, and upon the Defendant, Ocala Star-Banner Company, a notice in writing specifying the aforesaid article and the statements therein which Plaintiff alleged to be false and defamatory, a copy of said notice is attached hereto and made a part hereoff as Plaintiff's Exhibit "B".

5. That the aforesaid notice was delivered to the Defendant, Loyal Phillips, Publisher and Vice President of the Ocala Star-Banner Company, and the Defendant, Ocala Star-Banner Company, on April 20, 1966, a copy of the return receipt which is proof of service is attached hereto and made a part hereof as Plaintiff's Exhibit "C".

6. That the Plaintiff is and was on April 18, 1966, a pub-

lic officer, being elected to the office of Mayor of Crystal River, Citrus County, Florida, and on said date was a candidate for the office of Tax Assessor for Citrus County, Florida, and was and is a businessman in said Town and County, owning and operating a garage. The Plaintiff, Leonard Damron, is the only garage owner by the name of Leonard Damron doing business in the Marion, Citrus, Levy and Sumter County area.

7. That the words as set forth above in the article published on April 18, 1966, from their common usage imputed the charge of perjury to the Plaintiff, all from which the electorate of Crystal River and Citrus County, Florida, and others would believe that the Plaintiff had committed the crime of perjury, which is a felony punishable by imprisonment, and has left the impression that the Plaintiff was dishonest and had perjured himself in a United States Federal Court trial.

8. That the Plaintiff has never been charged with the crime of perjury and the statements contained in the article published by the Defendants on April 18, 1966, were false and libelous per se.

9. That the aforesaid article published on April 18, 1966 by the Defendants, set forth as Plaintiff's Exhibit "A", was published at a time and in a newspaper in general circulation in an area where voters resided who would cast their votes in a democratic primary on May 3, 1966, in which primary the Plaintiff was a candidate for the office of Tax Assessor of Citrus County, Florida, opposing two other candidates. That throughout the remainder of the political campaign, from April 18, 1966, the Plaintiff was repeatedly required to answer questions regarding the charges against him of perjury purportedly pending, and that although the Plaintiff fervently denied such charges and endeavored to make

it known that the statements printed in said article were false, he has been unable to remove the damage to his reputation caused by said article.

10. That the Plaintiff continues to hold the office of Mayor of the Town of Crystal River, Citrus County, Florida, having been duly elected to said office prior to the publication of the said article attached hereto as Plaintiff's Exhibit "A", and Plaintiff desires to continue to hold this office for which he will be required to campaign and run for re-election in December of 1966, and overcome the false and defamatory statements in said article that Defendants have caused to be published, which continues to create doubt and suspicion in the minds of the people of Citrus County, as to the integrity of the Plaintiff.

11. That because of the actions of the Defendants in the publication of the aforesaid article as attached hereto as Plaintiff's Exhibit "A", the Plaintiff has suffered irreparable damages to his reputation, as an individual, public officer, candidate for public office and as a businessman.

WHEREFORE, Plaintiff demands judgment for compensatory damages against Defendants in the amount of Fifty Thousand ($50,000.00) Dollars, and his costs.

WHEREFORE, Plaintiff demands judgment against the Defendants for punitive damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

WHEREFORE, Plaintiff demands trial by jury.

/s/ WALLACE DUNN
WALLACE DUNN
202 Legal Center
Ocala, Florida

Attorney for the Plaintiff

EXHIBIT A

Monday, April 18, 1966 Ocala Star-Banner

DAMRON CASE PASSED OVER TO NEXT U.S. COURT TERM

INGLIS – A case charging local garage owner Leonard Damron with perjury was passed over for the present term of Federal Court after Damron entered a not guilty plea before Federal Judge Harrold Carswell in Gainesville.

Damron was indicted by a Federal grand jury in Tallahassee last January and charged with perjury in a 1964 civil case which resulted in damages of $85,000 being awarded to a Yankeetown couple.

Mrs. Gail Finley alleged that Levy County Deputy Sammy Cason slammed on brakes causing her to injure her neck in October of 1962.

Cason and Deputy Walter Beckham went to Yankeetown with a warrant for the arrest of Mrs. Jean Rich Sill, who was allegedly in the Izaac Walton Lodge.

According to officials, the Finleys interferred with the officers, were arrested and charged with interfering with arrest.

A conviction obtained in County Court has been upheld through appeals by the Florida State Supreme Court.

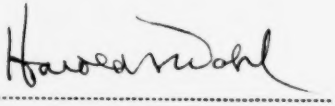
The civil suit which followed was filed under an old, little-used federal statute in which the Finleys charged former sheriff J. W. Turner and Cason with a violation of their civil rights.

Damron testified that he had seen Mrs. Finley in a neck brace in late 1957 or early 1958 several years prior to the incident, but numerous other witnesses, summoned by the plaintiff, gave testimony, saying that Mrs. Finley had not previously worn a brace.

Damron was released on $2,000 bond, following his arrest by federal marshals Jan. 27.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 33, I certify that I have this March 20, 1970, deposited in the United States mail box at Jacksonville, Florida, with first-class postage prepaid, envelopes containing copies of the foregoing petition and appendices addressed to (1) Hon. Wallace Dunn, Attorney for Respondent and counsel of record for him, at his office address, 1 East Silver Springs Boulevard, Ocala, Florida 32670; (2) Hon. Sid J. White, Clerk, Supreme Court of Florida, Tallahassee, Florida 32304; and (3) Hon. Raymond E. Rhodes, Clerk, Florida District Court of Appeal, First District, Tallahassee, Florida 32304; and that these are all the parties required to be served.



Harold B. Wahl